IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-994

Supreme Court, U. S.
FILED
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ROBERT L. DRAKE, JR., CLERK

EL PASO NATURAL GAS COMPANY,

Petitioner,

vs.

STATE OF ARIZONA; BART FLEMING, STATE TREASURER OF ARIZONA; STATE TAX COMMISSION OF ARIZONA and WALDO DeWITT and ROBERT KENNEDY, member of and constituting the State Tax Commission of Arizona; DEPARTMENT OF REVENUE OF ARIZONA; RICHARD B. HOWLAND, DIRECTOR OF DEPARTMENT OF REVENUE OF ARIZONA; APACHE COUNTY; LAVERE O. CONNOLLY, TREASURER OF APACHE COUNTY; COCHISE COUNTY; LOUISE E. PETERS, TREASURER OF COCHISE COUNTY; COCONINO COUNTY; ROSE STACY, TREASURER OF COCONINO COUNTY; GILA COUNTY, WILLIAM V. CUNNINGHAM, TREASURER OF GILA COUNTY; GRAHAM COUNTY; EVELYN HUGHES, TREASURER OF GRAHAM COUNTY; GREENLEE COUNTY; KITTIE POTTER, TREASURER OF GREENLEE COUNTY; MARICOPA COUNTY; GLENN O. STAPLEY, TREASURER OF MARICOPA COUNTY; MOHAVE COUNTY; GRACE MARLOW, TREASURER OF MOHAVE COUNTY; NAVAJO COUNTY; RAYMOND H. RANDALL, TREASURER OF NAVAJO COUNTY; PIMA COUNTY; JAMES LEE KIRK, TREASURER OF PIMA COUNTY; PINAL COUNTY; JIM L. TURNBULL, TREASURER OF PINAL COUNTY; SANTA CRUZ COUNTY; OSCAR H. ISLAS, TREASURER OF SANTA CRUZ COUNTY; YAVAPAI COUNTY; PAUL J. WEDEPOHL, TREASURER OF YAVAPAI COUNTY; YUMA COUNTY, and BILLY V. WALKER, TREASURER OF YUMA COUNTY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF FOR RESPONDENTS IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-994

EL PASO NATURAL GAS COMPANY,

Petitioner,

vs.

STATE OF ARIZONA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully request that the petition be denied because this Court lacks jurisdiction to review the judgment below.

JURISDICTION

This Court lacks jurisdiction to review the judgment below because the validity of a state statute is not drawn in question nor is petitioner's title, right, privilege or immunity claimed or specially set up under the Constitution or laws of the United States. Consequently, jurisdiction does not lie under 28 U.S.C. § 1257(3).

QUESTION PRESENTED FOR REVIEW

Should a state court's judgment be reviewed where the right or title of a party is not claimed under the Constitution or laws of the United States and where the state Supreme Court affirmed the judgment under the state law doctrine of res judicata or stare decisis?

REASONS FOR DENYING THE WRIT

Petitioner argues a violation of due process without articulating what right was infringed upon by the state Supreme Court. Petitioner's statement of the case clearly shows that the petitioner's complaint alleged only that the state appropriation laws in question violated various provisions of the Arizona

Constitution and statutes (Petition, p. 3). To comply with state law, that complaint was amended to also allege that the state tax rate was so excessive as to be fraudulent or arbitrary (Petition, p. 5). The trial court decided the merits of petitioner's challenge and entered judgment in favor of respondents (Petition, p. 5), See Respondents' Appendix. There is no allegation that the state law nor the trial court's decision was in violation of due process of law.

Had there been no right of appeal in Arizona, the final judgment of the state trial court in this case could not be reviewed by this Court under 28 U.S.C. § 1257(3). In Ohio ex rel. Bryant v. Akron Met. Park Dist., 281 U.S. 74 (1930) this Court said:

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." 281 U.S. at 80.

Accordingly, whether the state trial court's decision was affirmed on the merits or on the application of a state law doctrine of res judicata or stare decisis does not change the posture of this case in this Court. The decision of the state trial court was based on state law and the decision of the state Supreme Court was based on state law. There is no decision subject to review by this Court.

Petitioner cites Hansberry v. Lee, 311 U.S. 32 (1940) as the sole authority for its position. That case is readily distinguishable. In Hansberry, the defendants who were found by the Illinois Supreme Court to be bound by the judgment in a prior class action case were never permitted to litigate the

merits of their case. This Court found that the Illinois class action procedure did not adequately afford protection to class members who were not actually present as parties. Here, petitioner litigated the merits of the case in the state trial court. Had the state Supreme Court not overruled its prior opinion in Cochise County v. Southern Pacific Co., 99 Ariz. 385, 409 P.2d 549 (1966), that decision and State v. Arizona Public Service Co., 24 Ariz.App. 601, 540 P.2d 727 (1975), appeal dismissed, 426 U.S. 931 (1976), would have been used as stare decisis in affirming the state trial court's decision. No due process violation could have then been raised by the petitioner in this Court. The mere fact that the state Supreme Court chose to overrule its prior opinion but made its new opinion operate only prospectively, does not therefore violate petitioner's due process rights.

It is long settled that a state court's decision to overrule a prior opinion but not making it applicable to the pending case is not a violation of due process of law. In Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932), a case with facts strikingly similar to this case, Justice Cardozo declared:

> "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." 287 U.S. at 364.

The choice of making a decision prospective or retrospective is an inherent power of the judiciary. For

example, in England v. Louisiana State Bd. of Med. Examiners, 375 U.S. 411 (1964), this Court, in announcing the rule that a litigant foregoes his right, under the abstention doctrine to return to Federal District Court for determination of his federal claims by freely and without reservation submitting his federal claims to state court for decision, decided not to make that rule applicable to the appellants.

In a later decision, Linkletter v. Walker, 381 U.S. 618 (1965), this Court addressed at some length the question of prospective rulings and recognized that:

> "A ruling which is purely prospective does not apply even to the parties before the court." 381 U.S. at 621, 622.

This Court further discussed with approval the England decision and Justice Cardozo's opinion in Great Northern Ry. Co., supra, concluding:

> "**** the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. ** There seems to be no impediment--constitutional or philosophical--to the use of the same rule in the constitutional area where the exigencies of the situation require such an application. *** We believe that the Constitution neither prohibits nor requires retrospective effect." 381 U.S. at 628, 629.

The Arizona Supreme Court properly exercised its prerogative in making its decision here purely prospective. Petitioner's due process claim is without merit.

CONCLUSION

Petitioner's petition for writ of certiorari presents no federal question justifying review by this Court. It should be denied.

Respectfully submitted,

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February, 1980

APPENDIX

IN THE SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

EL PASO NATURAL GAS COMPANY, Plaintiff, vs. STATE OF ARIZONA; BART FLEMING, STATE TREASURER OF ARIZONA; STATE TAX COMMISSION OF ARIZONA AND WALDO DEWITT AND ROBERT KENNEDY, MEMBERS OF AND CONSTITUTING THE STATE TAX COMMISSION OF ARIZONA; DEPARTMENT OF REVENUE OF ARIZONA; RICHARD B. HOWLAND, DIRECTOR OF DEPARTMENT OF REVENUE OF ARIZONA; APACHE COUNTY; LAVERE O. CONNOLLY, TREASURER OF APACHE COUNTY; COCHISE COUNTY; LOUISE E. PETERS, TREASURER OF COCHISE COUNTY; COCONINO COUNTY; ROSE STACY, TREASURER OF COCONINO COUNTY; GILA COUNTY, WILLIAM V. CUNNINGHAM, TREASURER OF GILA COUNTY; GRAHAM COUNTY; EVELYN HUGHES, TREASURER OF GRAHAM COUNTY; GREENLEE COUNTY; KITTIE POTTER, TREASURER OF GREENLEE COUNTY; MARICOPA COUNTY; GLENN O. STAPLEY, TREASURER OF MARICOPA COUNTY; MOHAVE COUNTY; GRACE MARLOW, TREASURER OF MOHAVE COUNTY; NAVAJO COUNTY; RAYMOND H. RANDALL, TREASURER OF NAVAJO COUNTY; PIMA COUNTY JAMES LEE KIRK, TREASURER OF PIMA COUNTY; PINAL COUNTY; JIM L. TURNBULL, TREASURER OF PINAL COUNTY; SANTA CRUZ COUNTY; OSCAR H. ISLAS, TREASURER OF SANTA CRUZ COUNTY; YAVAPAI COUNTY; PAUL J. WEDEPOHL, TREASURER OF YAVAPAI COUNTY; YUMA COUNTY, and BILLY V. WALKER, TREASURER OF YUMA COUNTY, Defendants.	))))))C310694)))JUDGMENT)))))

specific purposes set out in the various sections of the appropriation act. This Court further does not equate appropriations with taxes, and the requirement of specifically stating the object of a tax has no applicability in this case.

The Court further finds that the purpose of the appropriations was to insure the availability of funds for the other 1970 appropriations and was for necessary and ordinary expenses for that current fiscal year. Since the reserve funds provided funding for other specific appropriations to specific departments of the State under the General Appropriation Act, the Plaintiff's argument that the appropriations were not to a particular department of State government, a State institution, public school, or for interest on the public debt is inappropriate.

The presumption of constitutionality as it relates to A.R.S. Sec. 35-131.03 and Sections 104 and 105 of the Appropriation Act (Chapter 162, Laws of Arizona, 1970) applies, and the Court finds that Sections 104 and 105 are not unconstitutional merely because Plaintiff claims that A.R.S. Sec. 35-131.03 is unconstitutional.

The Court further finds that the tax rate would have remained the same even without the questioned $32 million appropriations. The Plaintiff further has failed to show any damages to it. The tax does not appear to be excessive considering the total amount of reserve funds appropriated compared with the amount of surplus actually carried over at the end of the year. Further, it does not appear so grossly excessive as to be fraudulent and arbitrary when the State tax rate of 1970 is compared

with the State tax rate for the years immediately preceding 1970. Cochise County v. Southern Pacific Company, 99 Ariz. 385, 409 P.2d 549 (1966).

The Court further finds the mere fact that there is a cash balance on hand or a surplus carry-over at the end of the fiscal year does not establish the excessiveness of the tax rate.

The Court finding against the Plaintiff on the issue of constitutionality of the complained of appropriations, and the Court further finding that based upon all pleadings, affidavits on file before the Court, there exists no question as to the excessiveness or fraudulent nature of the complained of appropriations.

IT IS THEREFORE ORDERED denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motions for Summary Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by its Complaint, that Defendants have judgment against Plaintiff and that Defendants be awarded their costs herein.

DONE IN OPEN COURT this 27th day of April, 1977.

s/ PHILIP W. MARQUARDT
Judge of Superior Court

CERTIFICATE OF SERVICE

I, Edwin P. Lee, a member of the bar of this Court, certify that on this 6th day of February, 1980, three copies of the Brief in Opposition were mailed, postage prepaid, to Harold C. Warnock and Stephen A. Thomas, 2 East Congress Street, Ninth Floor, Tucson, Arizona 85701, Counsel for the Petitioner. I further certify that all parties required to be served have been served.

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